IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated:15.03.2002

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THE HONOURABLE MR. JUSTICE P. SHANMUGAM

Appeal Suit No.179 of 1989 and Second Appeal No.1565 of 1989

A.S. No.179 of 1989 :

1. UNIVERSAL CYCLE ACESSORIES,
MANDAIYUR, A PARTNERSHIP FIRM
REP. BY ITS PARTNER
V. ANANTHANARAYANAN,
TRICHY ROAD, MANDAIYUR,
KULATHUR TALUK, PUDUKOTTAI DT.

2. R. SRINIVASAN, PARTNER,
UNIVERSAL CYCLE ACCESSORIES,
MANDAIYUR, KULATHUR TALUK,
PUDUKOTTAI DIST.

3. R. SRINIVASAN

4. V. ANANTHANARAYANAN .. APPELLANTS

Vs.

TAMIL NADU ELECTRICITY BOARD,
REP. BY ITS DIVISIONAL CHIEF ENGINEER,
TENNUR, TIRUCHIRAPALLI-17. .. RESPONDENT

S.A. No.1565 of 1989 :

UNIVERSAL CYCLE ACESSORIES,
MANDAIYUR, A PARTNERSHIP FIRM
REP. BY ITS PARTNER
V. ANANTHANARAYANAN. .. APPELLANT

Vs.

1. THE EXECUTIVE ENGINEER,
PUDUKKOTTAI ELECTRICITY SYSTEM,
PUDUKKOTTAI.

2. TAMIL NADU ELECTRICITY BOARD,

REP. BY ITS CHAIRMAN,
ANNA SALAI, MADRAS-600 002.

3. ASSISTANT ACCOUNTS OFFICER,
TAMIL NADU ELECTRICITY BOARD,
REVENUE DEPARTMENT,
PUDUKKOTTAI. .. RESPONDENTS

PRAYER : Appeal Suit No.179 of 1989 against the Judgment and Decree of the Subordinate Judge, Pudukottai dated 30.8.1988 made in O.S. No.75 of 1986.

Second Appeal No.1565 of 1989 against the Judgment and Decree of the Court of the District Judge, Pudukottai dated 18.1.1989 made in A.S. No.73 of 1988.

:ORDER

This Appeal coming on for hearing, and upon hearing the arguments of Mr. G. Anbumani for Mr. S. Ananthanarayanan, Advocate for the Appellants, and of Mr. V. Rangapashyam, Advocate for the Respondent, and having stood over for consideration till this day, the court delivered the following Judgment :-

J U D G M E N T

Defendants in suit O.S. No.75 of 1986 and plaintiffs in O.S. No.220 of 1987, are the appellants in both the above appeals.

2. The Tamil Nadu Electricity Board filed the suit O.S. No.75 of 198 6 for recovery of a sum of Rs.44,851.95 with interest, representing the minimum monthly current consumption charges during the relevant year. The suit was decreed and the first appeal A.S. No.179 of 1989 is against this judgment and decree.

3. O.S. No.220 of 1987 was filed by the consumer/appellant for a declaration to declare the disconnection of electricity service by the Electricity Board from 1.3.1986 and the assessment of the consumption charges as illegal and also for a permanent injunction not to collect any amount from the plaintiff. The suit was dismissed and confirmed by the District Judge in A.S. No.73 of 1988. The second appeal S.A. No.1565 of 1989 is against this judgment and decree.

4. The appellant is a partnership firm manufacturing cycle accessories and spare parts. After establishment of the factory, the firm applied for and obtained electricity service connection for their industrial purpose in S.C. Nos.111 and 113. The appellant as well as the Board entered into two agreements dated 8.5.1982, Exs.B.1 and B.2. Service Connection No.111, Mandaiyur was provided with 63 H.P. and 42

H.P. load was provided in respect of Service Connection No.113, Mandaiyur. It is stated that the monthly minimum charges during normal period when there is no quota system is calculated at the rate of Rs.10/- per horse power of connected load, i.e. a minimum of 20 units per horse power charged at 50 paisa per unit is calculated on the connected load. In this specific case, the monthly minimum charges during normal period when there is no quota system is Rs.630 at 50 paisa for 1260 units for SC.111, and Rs.420 at 50 paisa for 840 units plus 20 percent surcharge on consumption for SC.113 (being welding load). However this rate is not applicable when the quota system is enforced. The appellant was running the industry and had been paying the current consumption charges upto September 1982 on the above basis. However, the restriction on power supply was enforced and a quota system was introduced due to the power cut effected from 3.10.1982 onwards. The quota that was allotted to the service connections of the appellant are as follows :

SERVICE CONNECTION No.111 SERVICE CONNECTION No.113

3.10.82 to 14.10.82 3.10.82 to 14.10.82
212 Units - 150 Units
14.10.82 to 31.10.82 14.10.82 to 31.10.82
- 1102 Units - 713 Units

1.1.83 till 2.3.83 1.1.83 till 2.3.83
- 88 Units Rs.44/- - 118 Units Rs.70.80

(Rs.59 + 20%
surcharge

Rs.11.80)

According to the appellant, the Board is entitled to collect only Rs.140.80 (44 + 70.80). However, the Board claimed the minimum monthly charges of a sum of Rs.1,134/- for 1260 + 840 units, totalling Rs.6,8 04/- from October 1982 to March 1983. Since the appellant paid only a sum of Rs.3,384.75, the Board disconnected the service on 1.3.1983. The Board further made a demand on the same basis even during the disconnected period upto March 1986 totalling Rs.44,851.95 and the suit O.S. No.75 of 1986 was laid by the Board for recovery of the said amount on 31.3.1986.

5. The appellant, as plaintiff filed a suit O.S. No.213 of 1984 initially in the District Munsif Court, Pudukottai and on transfer of the same to the Subcourt, Pudukottai, the suit was re-numbered as O.S. No.220 of 1987. According to the plaintiff, during the restricted quota system from the month of January 1980 to 1982, they were allotted only 88 units for S.C. No.111 and 118 units for S.C. No.113 as against the otherwise minimum normal consumption under monthly minimum consumption of

1260 units for S.C. No.111 and 840 units for S.C. No.113. As a matter of fact, for exceeding the quota, by two units, the services were disconnected on 23.1.1983 and the power supply was restored by the Board only on 1.2.1983 after collecting re-connection charges and reducing the quota for February 1983 by the excess units consumed in January 1983. Therefore, actually, the amount payable namely Rs.114.80 was tendered in the office of the Board in time in January 19 83. However, the payment was not accepted by the Board stating that the bill is to be paid for the monthly minimum consumption. A written endorsement to that effect was made by the Assistant Divisional Engineer, Keeranur on 28.2.1983, Ex.A.9. Contending that as per the terms and conditions, during the quota system period, the plaintiff is liable to pay only in respect of the restricted minimum quota of power allotted or the actual power consumed, which is higher and inspite of the objection, the service connection was disconnected illegally and in violation and breach of the terms of the contract, the appellant filed the suit O.S. No.213 of 1984 in the District Munsif Court, Pudukottai.

6. Both the suits were tried together. The suit filed by the Board O.S. No.75 of 1986 was decreed and the suit filed by the appellant was dismissed. As against the dismissal of the suit, the appellant preferred a first appeal A.S. No.73 of 1988 in the District Court, which was confirmed in appeal. As against the decree passed in favour of the Board, the first appeal has been preferred. Hence both the appeals.

7. Learned counsel Mr. Anbumani appearing on behalf of the appellant contended that the appellant is not liable to pay the minimum charges in view of the quota system introduced during the period of power cut and restricted supply. In any event, according to him, the appellant cannot be asked to pay the minimum charges even after disconnection and even when they have not utilised the electricity supply. He further submitted that under two sets of circumstances, the guaranteed minimum payable will have to be reduced, i.e.,
(i) when the consumer is not able to take the electricial energy due to force majure circumstances ; and
(ii) when the Board is not able to supply electrical energy as per the agreement due to force majure circumstances.

According to him, the courts below failed to interpret Clause 12 of the agreement properly. He has also referred to the proceedings of the Board B.P. Ms. No.3 (Accounts) dated 20.9.1979 regarding dismantling of the service connection and submits that for the failure on the part of the Board in not dismantling the service connection within three months from the date of disconnection, the appellant cannot be made liable. He also submits that the industry has become sick and has been closed from the date of disconnection. According to him, the orders of the Board are unconscionable, unreasonable and against the principles of natural justice.

8. Mr. Rangapashyam arguing on behalf of the Electricity Board submits that the 'Force Majeure' clause cannot be applied to the facts of

the case and the appellant is bound by the terms and conditions of the agreement and is bound to pay the monthly minimum current charges. The appellant, having agreed to take supply even under conditions of restrictions of load and time that may be fixed by the Board from time to time, is bound to pay the minimum or special guarantee in full, notwithstanding the such restrictions. According to him, the minimum guarantee is necessary to maintain the Board's services and therefore, the appellant cannot avoid his legal obligations to pay the minimum guarantee under any circumstances. He derives support to the various clauses of the agreement, besides the terms and conditions of the electricity supply.

9. I have heard the counsel for the parties, gone through the records and considered the matter carefully.

10. The main question that arises for consideration in both these appeals is whether the Electricity Board is entitled to levy minimum charges even during the period of power cut. The facts leading to the provision of service connection and the various dates on which the amounts were paid and later defaulted and the figures supplied by the appellant in this regard are not in dispute. The relevant clause in the agreement says that for all electrical energies supplied, the consumer shall pay at the rate given and in accordance with the terms contained in the agreement. The non-payment of any bill within 30 days from the date of issue of the bill shall result in disconnection and the disconnection of the supply shall not relieve the consumer of his liability to pay the minimum charges and the guaranteed revenue provided for. Clause 12, which has been subjected to interpretation by the courts below is as follows :

"Industrial cases : If the Board is satisfied that the consumer is prevented from receiving or using the electrical energy under this agreement due to any force majeure condition, the annual minimum/ guarantee for such period of short supply will be reduced to the quota of consumption if any specifically permitted by the Board or the actual consumption whichever is higher and the consumer shall pay for the remaining period of the year during which there is no reduction in supply, proportionate minimum or guarantee; This concession is subject to the express condition that the consumer agrees to the extension of the period of the agreement by the period for which the concession is availed."

One of the clauses also reads as follows :
"The consumer agrees to take supply under any conditions of restrictions of load and time that may be fixed by the Board from time to time and to pay the minimum/special guarantee under this agreement in full notwithstanding such restrictions."
"Supply is liable to be restricted, staggered or cut off altogether, as the case may be, if the power position or any other emergency warrants such a course of action."

The argument on behalf of the Board is that the restriction of power supply due to power cut will not come under 'force majeure' condition so as to call for the reduction of the minimum guarantee. Clause 32 of the terms and conditions of supply of electrical energy is as follows :

"If the Board is satisfied that the consumer is prevented from receiving or using the electrical energy either in whole or in part owing to lockout which should be complete, strike which should be complete, temporary closure due to labour problems which should be complete, riots, insurrections, low water restrictions, command of Civil or Military authority or if the Board is prevented from supplying or is unable to supply such electrical energy owing to lock out or strike of its employees, breakdown of machinery or plant, force majeure or any other cause over which the Board has no control, during such periods the consumer will be required to pay for the actual recorded demand and consumption. The Annual Minimum charges or guaranteed revenue for such periods of short supply will if necessary be reduced to the quota of consumption and/or demand specifically permitted by the Board of the actual consumption and or/demand whichever is higher and the consumer shall pay for the remaining period of the year during which there has been no restriction in supply the proportionate annual minimum charges or guaranteed revenue. This concession is subject to the express condition that the consumer agrees to the extension of the period of agreement by the period for which the concession is availed."

11. The Government of Tamil Nadu, in exercise of the power conferred by Section 3 of the Tamil Nadu Essential Articles and Requisitioning Act, 1949 (Tamil Nadu Act XXIX of 1949), issued the Amendment to the Tamil Nadu Restriction on Consumption of Electricity Order, 1976 imposing restrictions in consumption of electrical energy from 2.10.1982 . As per this amendment, among other things, a cut of 30% on energy for all L.T. industries and commercial services with a connected load of 75 HP and above was imposed. A quota system was prescribed in Annexure-III to the said Order. As per this Annexure, the cut on energy specified will be applied to the average consumption of three consecutive months advantageous to the consumer during the period from 1.7 .1981 to 30.6.1982. The quota will be on monthly basis. However, the meter readings will be taken on weekly basis and if the quota is found to be exceeded at any time, the service will be disconnected with immediate effect and supply will be resumed after the quota period is over. The unitilised quota in a quota period will not be carried over to the subsequent period. As per this notification, if the quota fixed to a consumer exceeds, at any time, the service will be disconnected with immediate effect. There is no dispute in this case that the service connection was disconnected on 23.1.1983 for exceeding the quota by two units. The Board, in their proceedings B.P. Ms. (Crl.) No.18 (Accounts Branch) dated 3.1.1984 have clarified on the question whether the minimum has to be insisted upon even in case where a consumer is not in a position to satisfy the minimum by reason of the quota given during the power cut period being not adequate to cover the minimum. It was stated that the minimum monthly current consumption

charges specified under the tariff are in the nature of minimum charges for the maintenance of lines, etc. and have to be paid irrespective of the units given or consumed. The argument of the counsel for the appellant is that this cannot be made applicable to the appellant, and in any event, it is prospective.

12. The appellant, as consumer, agreed to take supply under any conditions of restrictions and to pay the minimum and has bound himself to get the service connection disconnected if he is unable to pay the minimum charges. But, the question is whether this minimum consumption of units will be reduced in case of short supply of electricity. The argument of the counsel for the appellant on the interpretation of force majeure condition is that, that will take in the power cut period also; whereas, the counsel for the Board submits that, that will mean only calamities like earthquakes, floods etc. The liability of a consumer to pay the minimum consumption charges under normal circumstances cannot be disputed. In AMALGAMATE ELECTRICITY COMPANY LTD. VS. JALGAON BOROUGH MUNICIPALITY (A.I.R. 1975 S.C. 2235), the Supreme Court held that a clause in an agreement for supply of energy, of which the licensee was assured of minimum consumption of energy by the consumer and for payment of the same, whether it was consumed or not is not void under Section 23 of the Indian Electricity Act, 1910. The clause embodies what is known in common parlance as doctrine of minimum consumption. To the same effect was the judgment in BIHAR STATE ELECTRICITY BOARD VS. GREEN RUBBER INDUSTRIES [1990 (1) S.C.C. 731], wherein their lordships upheld the clause providing the liability of the consumer to pay minimum guaranteed charges irrespective of whether any energy was used or not. Their lordships held that this clause cannot be said to be unreasonable inasmuch as the supply of electricity to consumer involves incurring of overhead installation expenses by the Board which do not vary with the quantity of electricity consumed and the installation has to be continued irrespective of whether the energy is consumed or not until the agreement comes to an end.

13. In both the above cases, the minimum guarantee question was not considered in the light of the inabiilty of the Board to supply electrical energy due to power cut or other circumstances beyond their control. It cannot be in dispute that Clause 12 provided for a situation by which the minimum guarantee will be reduced to that extent, the situation being force majeure condition. Similarly, Clause 32 of the terms and conditions of the supply provides for reduction of guaranteed amount. As per this clause, both the Board as well as the consumer are entitled to seek for reduction of the guaranteed amount in case the Board is prevented from supplying or is unable to supply electrical energy owing to lockout, strike of its employees, breakdown of machinery or plant, force majeure or any other cause over which the Board has no control; similarly, the consumer, owing to lockout, strike, closure, riot, low water restrictions, command of Civil or Military authority, is prevented from receiving or using the electrical energy. In such cases, the annual minimum charges or guaranteed revenue for such period of short supply will be reduced to the quota of the consumption and/or demand

specifically permitted by the Board or the actual consumption and/or demand, whichever is higher. Clause 32, which comes under the terms and conditions of supply of electrical energy, is made in exercise of the power conferred by Section 49 of the Electricity Supply Act, 1948 as per the Board's Proceedings Ms. No.780 dated 21.6.1977.

14. The Supreme Court, in NORTHERN INDIA IRON & STEEL CO. VS. STATE OF HARYANA [1976 (2) S.C.C. 877], has held that the inability of the Board to supply electrical energy due to power cut will be considered as a circumstance beyond the control of the consumer which prevented it from consuming electricity as per the contract and to that extent it wanted to consume. As a matter of fact, their lordships went into the similar question that arose in that case and the argument and observations of their lordships can usefully be referred to in this case

"An argument was advanced before us in the first instance by counsel for the appellants with reference to the definition of the demand charge in clause 1(h) of the terms and conditions of supply framed by the Board that since the Board was not ready to serve the consumer and the consumer was ready to consume maximum electric energy the former was not entitled to ask for any demand charge. This argument, in the beginning was combated with equal force, if not more, on behalf of the Board and it was asserted that the Board was entitled to assess and claim the full demand charge as per clause 4 of the tariff irrespective of the fact whether it was in a position to supply the energy according to the demand of the consumer or not. Such an extreme stand on either side appeared to us a bit puzzling and leading to inequitable results. The difficulty was not easy to solve If we were to hold that for th Board's inability to supply a fraction of the consumers demand as per the contract it could claim only the energy charge and not the demand charge, it would have been very hard and injurious to the Board and the consumer would have unjustifiably got the supply at a very cheat rate. If on the other hand, we were to say that the consumer was liable to pay the entire demand charge as per the method of assessment provided in clause 4 of the tariff even when for no fault of it, it could get only a fraction of its demand fulfilled, resulting in its not being able to run the industry to its full capacity, it would be liable to pay a huge amount per month, and this will not only be uneconomical but would seriously affect its economic structure. But we were happy to find that a just, equitable and legal solution of the difficulty was provided during the course of the argument on either side and that is with reference to sub-clause (f) of clause 4 of the tariff. It is, therefore, not necessary to resolve the extreme stand taken on either side.
Under clause 4(f) of the consumer is entitled to a proportionate reduction of demand charges in the event of lockout, fire or any other circumstance considered by the supplier beyond the control of the consumer; that is to say, if the consumer is not able to consume any part of the electric energy due to any circumstance beyond its control and which is considered by the Board to be so, then it shall get a proportionate reduction in the demand charge. The circumstance of power cut which disabled the Board to give the full supply to the appellant

because of the governemnt order under Section 228 of the 1910 Act, undoubtedly would be a circumstance which disabled the consumer from consuming electricity as per the contract. And this was circumstance which was beyond its control and could not be considered otherwise by the Board. It entitled the consumer to a proportionate reduction of the demand charges. This interpretation of sub-clause (f) of clause 4 of the tariff was accepted to be the correct, legal and equitable interpretation on all hands. In our opinion, it is so."

Clause 32 is similar to clause 4(f) which came up for consideration before their lordships, which is as follows :

"(f) 'Force Majeure' - In the event of lockout, fire or any other circumstance considered by the supplier to be beyond the control of the consumer, the consumer shall be entitled to a proportionate reduction of demand charges, minimum charges provided he gives atleast three days' notice on the supplier for shut down for not less than 15 days' duration.

The said view was followed in BIHAR STATE ELECTRICITY BOARD VS. DHANAWAT RICE AND OIL MILLS [1989 (1) S.C.C. 452], wherein it was held that when supply of electricity is disrupted by trippings, load sheddings and power cuts, it would be a circumstance beyond the control of the consumer to consume the electricity upto the minimum guarantee. In such a situation, the consumer's liability to pay the minimum guaranteed charges cannot be wholly waived, but he will be entitled to proportionate reduction of the annual minimum guaranteed bills in the specific clause in the agreement.

15. The judgment relied on by the counsel for the Board in SUPERINTENDING ENGINEER, MADURAI ELECTRICITY DISTRIBUTION CIRCLE VS. NELCO METAL PRODUCTS PVT. LTD. [2002 (1) C.T.C. 40] has to be distinguished on the facts of that case. The attention of the learned judge was not drawn to clause 32 of the terms and conditions of supply and clause 1 2 of the agreement. In the light of these specific clauses, the Electricity Board has to make a proportionate reduction in the demand charges and there is no escape from their liability, both from the terms of the contract as well as from the statutory "Terms and Conditions of supply of electrical energy by the Tamil Nadu Electricity Board".

16. For the reasons stated above, the disconnection of the service conncetion of the appellant industry on 1.3.1983 is declared to be illegal and the amount demand on the basis of minimum monthly current consumption charges is liable to be set aside and is hereby set aside. As rightly pointed out, as per the Proceedings B.P. No.3 dated 20.9.1979, the service lines of disconnected services should have been dismantled promptly if disconnection remains for more than three months by giving 15 days' notice to the consumer. In this case, the Board has not only failed to dismantle the lines within three months from 1 .3.1983 without any order restraining them from doing so, but has chosen to claim monthly minimum charges for the period upto March, 1986 . As pointed out, the clarification issued dated 3.1.1984 is subsequent to the disconnection clarifying that the minimum charges payable inspite of the

quota during the period of power cut is prospective in nature cannot be

enforced against the appellant. That apart, this clarification runs counter to the statutory terms and conditions and clause 12 and cannot over-ride them.

17. For all the above reasons, the appeals are allowed. The suit O.S. No.75 of 1986 is dismissed and the suit filed by the appellant is decreed as prayed for. However, there will be no costs.

Index : Yes
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Internet : Yes

To

1. The Subordinate Judge,
Pudukottai.

2. District Judge,
Pudukottai.
ab

P. SHANMUGAM, J.

Judgment in
A.S. No.179 of 1989 and
S.A. No.1565 of 1989.